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| APPLICATION NO. | FILING DATE | FIRST NAMED INVENTOR | ATTORNEY DOCKET NO. | CONFIRMATION NO. |
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| 23850 | 7590 | 09/29/2009 | | |
| Ballard Spahr LLP SUITE 1000 999 PEACHTREE STREET ATLANTA, GA 30309-3915 | | | | |
| EXAMINER | | | | |
| JUSKA, CHERYL ANN | | | | |
| ART UNIT | | PAPER NUMBER | | |
| 1794 | | | | |
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Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary

Application No.

10/719,389

Applicant(s)

WRIGHT, JEFFERY J.

Examiner

Cheryl Juska

Art Unit

1794

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --
Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 21 August 2009.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1, 3-8, 21-23, 25-30, 53 and 54 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1, 3-8, 21-23, 25-30, 53 and 54 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- 1) ☐ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO/SB/08)
Paper No(s)/Mail Date _____

- 4) ☐ Interview Summary (PTO-413)
Paper No(s)/Mail Date _____
- 5) ☐ Notice of Informal Patent Application
- 6) ☐ Other: _____

DETAILED ACTION

Continued Examination Under 37 CFR 1.114

1. A request for continued examination (RCE) under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114. Applicant's submission filed on August 21, 2009 has been entered.

Response to Amendment

2. Applicant's amendment filed with the RCE has been entered. Claims 1 and 21 have been amended as requested. Claims 2, 9-20, 24, and 31-52 have been cancelled. Thus, the pending claims are 1, 3-8, 21-23, 25-30, 53, and 54.

Response to Arguments

3. Applicant's arguments with respect to the claims rejected under 103 as set forth in section 2 of the last Office Action (Non-Final Rejection mailed 07/18/08) have been considered but are moot in view of the new ground of rejection. Specifically, the prior art rejection over the Brumbelow reference has been modified from an obviousness rejection to an anticipation rejection based upon a re-reading of said reference.

Claim Rejections - 35 USC § 102

4. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless --

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

5. Claims 1, 3-8, and 53 are rejected under 35 U.S.C. 102(b) as being anticipated by US 2002/0134486 issued to Brumbelow et al.

Brumbelow discloses a carpet and method of making said carpet, wherein the carpet comprises a primary backing, a plurality of fibers attached to the primary backing, an adhesive backing, and an optional secondary backing (abstract and claim 2). The adhesive backing material and/or optional secondary backing comprises at least one homogeneously branched ethylene polymer (HBEP) (section [0029] and claim 2), preferably a substantially linear ethylene polymer (SLEP) (section [0080]). Additionally, said adhesive backing (i.e., precoat) and/or optional secondary backing contain a blowing agent to produce a foamed backing (section [0029] and claim 2). The HBEP can be used alone (i.e., 100%) or can be blended or mixed with one or more other polymeric materials (section [0103]). The HBEP polymer composition may be modified with a maleic anhydride grafted ethylene polymer (sections [0140] and [0141]) and filler (section [0149]). The HBEP polymer may have a density ranging from 0.875 - 0.910 g/cc (section 0090)). "The thickness of an unexpanded, collapsed extrusion coated adhesive backing material is in the range from about 6 to about 80 mils" (section [0133]).

Thus, Brumbelow teaches the presently claimed invention with the exception of an explicit teaching that (a) the foam backing layer has a thickness of greater than 0.075 inches or

75 mils (1.9 mm) and (b) the foam cushion backing is substantially uncrosslinked. Regarding the former exception, the reference clearly teaches the adhesive backing layer prior to foaming or expansion (i.e., unexpanded, collapsed extrusion coated adhesive backing material) may be about 6-80 mils thick. Since activation of the blowing agent will inherently increase the thickness thereof, applicant's limitation of at least 75 mils thick is anticipated by at least Brumbelow's teaching of 75-80 mils prior to expansion.

Regarding the latter exception, Brumbelow is silent on the inclusion of a crosslinking agent in the HBEP foam composition. In fact, the reference is silent regarding any crosslinking (e.g., process conditions and/or agent to facilitate crosslinking reaction, type of crosslinking reaction, degree of crosslinking desired, etc). Since crosslinking of a polymer composition typically involves the addition of a crosslinking agent to facilitate a crosslinking reaction to a significant degree, it is reasonable to presume Brumbelow's silence regarding crosslinking is an inherent teaching that the HBEP foam composition is "substantially uncrosslinked." The burden is shifted to applicant to prove otherwise. Therefore, claims 1, 3-8, and 53 are rejected as being anticipated by the cited Brumbelow reference.

Claim Rejections - 35 USC §103

6. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

7. Claims 21-23, 25-30, and 54 are rejected under 35 U.S.C. 103(a) as obvious over the cited Brumbelow reference.

Regarding claims 21-23, 25-30 and 54, Brumbelow fails to explicitly teach the addition of a resilient filler material, such as EPDM, NBR, or SBR. However, it is argued said claims are obvious over the cited prior art. Specifically, it is well known in the art to add such resilient polymers to polyolefin compositions in order to improve impact resistance. Applicant was previously given Official Notice of this fact (section 7 of the Non-Final Office Action mailed 12/12/2007). Since applicant has not traversed said Official Notice in the responses filed 06/12/2008 or 08/21/2009, the fact is now taken as an admission by applicant (i.e., applicant's own admission). See MPEP 2144.03, section C:

If applicant does not traverse the examiner's assertion of official notice or applicant's traverse is not adequate, the examiner should clearly indicate in the next Office action that the common knowledge or well-known in the art statement is taken to be admitted prior art because applicant either failed to traverse the examiner's assertion of official notice or that the traverse was inadequate.

In view of the fact that it is known to add resilient polymers to polyolefin compositions in order to improve impact resistance thereof, it would have been readily obvious to one of ordinary skill in the art to add a resilient material to the invention of Brumbelow in order to improve impact resistance of the foam layer. Therefore, claims 21, 22, 25-30, and 54 are rejected.

Additionally, the amount of resilient material present in the foam layer would be readily determinable to one of ordinary skill in the art. It has been held where the general conditions of a claim are disclosed in the prior art, discovering the optimum or workable ranges involves only routine skill in the art. *In re Aller*, 105 USPQ 233. Therefore, claim 23 is also rejected as being obvious over the prior art.

Conclusion

8. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Cheryl Juska whose telephone number is 571-272-1477. The examiner can normally be reached on Monday-Friday 10am-6pm. If attempts to reach the examiner by telephone are unsuccessful, the examiner can be emailed at cheryl.juska@uspto.gov or the examiner's supervisor, D. Lawrence Tarazano can be reached at 571-272-1515. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

9. Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

/Cheryl Juska/
Primary Examiner
Art Unit 1794